IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.513 OF 2002

Smt.Maushami Amarnath Batabyal)
residing at Flat No.42, 4th)
Floor, Buena-Vista Building,)
J.Bhosale Marg,Mumbai-400 021.)..APPLICANT

Versus

The State of Maharashtra)
through Anti Corruption Bureau)
Worli, Mumbai.)..RESPONDENT

Mr.V.G.Pradhan, Senior Advocate i/b.Mr. Katkar for the Applicant

Mr. K.V. Saste, P.P. for the Respondent.

CORAM: A.M. KHANWILKAR, J.

JUDGMENT RESERVED ON: 25TH APRIL, 2005

JUDGMENT PRONOUNCED ON: 8TH AUGUST, 2005

JUDGMENT:

. This Revision Application takes exception to the order passed by the Special Judge dated November 2, 2002 in Special Case No.47 of 1990. The applicant is named as Accused No.2 in the abovesaid Special case. Besides the applicant, one Amarnath Aghornath Batabyal, who incidently was the husband of the applicant and at the relevant time a public servant, has been named as accused No.1. Both the accused are being tried for offences punishable under the provisions of the Prevention

of Corruption Act, 1988 (hereinafter referred to as the Act). Charges were framed on 25th September, 1991, to which both the accused pleaded not guilty. The substantive offence for which the accused are being tried is under Section 13(1)(e) read with Section 13(2) of the Act. In so far as the Applicant-accused No.2 is concerned, she is charged for offence of abetement under Section 109 of I.P.C., read with Sections 13(1)(e) and 13(2) of the Act. The charges as framed read thus:-

. "I, Limaye, S.M. the Special Judge for Greater Bombay, do hereby charge you:-

1. Amarnath Agharnath Batabyal 2. Smt. Maushami Amarnath Batabyal

FIRSTLY: That the Accused No.1, Amarnath Aghornath Batabyal, being employed as the Divisional Commissioner, Aurangabad Division, Maharashtra State (since retired from Govt. Service with effect from 28th April, 1989) as such, a public servant within the meaning of section 21 of the Indian Penal Code, 1860 (XIV of 1860) (equivalent to section 2(e) of the Prevention of Corruption Act, 1988 (49 OF 1988), during the period of his public service from 16th May, 1960 to 3rd February, 1986 (the check period) had acquired and as on 31st January, 1986, was found in possession in his name and/or at on his behalf in the name of his wife, Accused No.2, Smt. Maushami Amarnath Batabyal, at Bombay, Lucknow and other places for which Accused No.1, Amarnath Aghornath Batabyal, could not satisfactorily account of pecuniary resources of property, valued at Rs.6,50,348.80 as particularised in Appendix "A",disproportionate to his known sources of income by an account of Rs.4,40,848.70, as particularised in Appendix "B". Considering the total income of Rs.10,62,489.65 earned by Accused No.1, Amarnath Aghornath Batabyal, and the members of his family, during the period of his public service, as aforesaid, as particularised at Appendix "B", and considering the total minimum Expenditure of Rs.8,52,989.55, incurred by Accused No.1, Amarnath Aghornath Batabyal, and the members of his family, during the course of his public service as aforesaid, as particularised at Appendix "C" and, thereby, Accused No.1, Amarnath Aghernath Batabyal, the Divisional Commissioner, Aurangabad, Maharashtra State, committed an offence punishable under section 5(2) read with section 5(1)(e) of the Prevention of Corruption Act, 1947 (II of 1947) (equivalent to

section 13(2) read with section 13(1)(e) of the Prevention of Corruption Act, 1988 (49 of 1988);

SECONDLY:- That Accused No.2, Smt. Maushami Amarnath Batabyal, wife of Accused No.1, Amarnath Aghornath Batabyal, a public servant, as aforesaid, knowingly, aided and abetted Accused No.1, Amarnath Aghornath Batabyal, in the commission of the aforesaid offence, by holding pecuniary resources or property worth Rs.1,73,828.40 in her name at the instance of and/or in behalf of Accused No.1, Amarnath Aghornath Batabyal, as particularised in Appendix "A-2" and, thereby Accused No.2, Smt. Maushami Amarnath Batabyal committed an offence punishable u/s.5(2) read with 5(1)(e) of the Prevention of Corruption Act, 1947 (Act II of 1947) (equivalent to section 13(2) read with 13(1)(e) of the Prevention of Corruption Act, 1988 (49 of 1988), and Section 109 of the Indian Penal Code, 1860 (XLV of 1860).

And I hereby direct that to be tried on the aforesaid charges."

2. While the trial was in progress, the husband of the Applicant-Accused No.1, expired on 28th July, 2002. In view of this development, when the case was taken up on 2nd November, 2002 by the Special Judge, Counsel for the Applicant-Accused No.2, raised objection regarding the continuation of the trial. It was contended before the Special Judge on behalf of the Applicant that as the principal accused has expired, trial against his wife, Applicant herein, who is charged only for abetment cannot survive. The Special Judge, however, by the impugned order held that merely because the principal accused has died the entire trial is not affected; in any case against the applicant surviving co-accused. He further observed that unless it is decided whether the principal accused has or has not committed any offence, no final conclusion in respect of the charge against the Applicant herein can be arrived at, which can be decided at the time of judgment after recording the evidence and hearing the parties. This order is the subject matter of

challenge in the present Revision Application. Besides, the Applicant prays that the trial pending against her before the Special Judge be stayed.

3. According to the Applicant, the two charges, as framed against the accused, are inseparable. It is submitted that the trial as against the principal accused would abate after his death, for which reason the trial cannot proceed or survive even against the Applicant herein, who has been charged only with abetment under Section 109 of I.P.C. It is further contended without prejudice to the above said submission, even if the trial is to proceed against the Applicant, it will be an unfair trial qua the Applicant. This is so because, for the nature of offence charged against the principal offender under Section 13(1)(e) of the Act, it is only the public servant, who is the principal offender, expected to satisfactorily account of pecuniary resources or property disproportionate to his known sources of income. In his absence, such explanation will not come on record, which will be unjust and unfair to the Applicant, as it will result in finding of guilt against the principal offender in view of the legal presumption remaining unrebutted.

4. On the above arguments, the Applicant prays that although there is no express relief of quashing of the criminal prosecution pending against the Applicant, this Court may show indulgence to the Applicant and pass such order to do substantial justice.

5. The learned Public Prosecutor, on the other hand, has

supported the order passed by the Special Judge, which is impugned in this Revision Application. He submits that the limited question that requires to be considered in the present Revision Application is to examine the correctness of the view taken by the Special Judge. No more and no less. In so far as the argument pressed into service on behalf of the Applicant, contends the learned Public Prosecutor, the same is ill advised. It is submitted that even if the trial as against the principal accused is abated on account of his death, that by itself will not enure to the benefit of the Applicant. According to the learned Public Prosecutor, the Applicant will have to stand the trial on merits. It is submitted that it is well settled that merely because the principal offender is acquitted, that by itself cannot be the basis to acquit the co-accused who is charged under Section 109 of I.P.C. Though such a view may be generally correct, there are exceptions to that Rule. It is argued that in the present case nothing has been brought on record by the Applicant to show that the prosecution case against the applicant falls under the third clause of Section 107 of I.P.C. and not the first or the second clauses thereof. It is then contended that even if the principal offender has died during the trial that would not absolve the applicant to stand the test of trial, and offer explanation which the principal offender could have offered, if within the knowledge of the Applicant. It is argued that, in a converse case where the principal offender was alive during the trial but failed to satisfactorily account of pecuniary resources or property disproportionate to his known sources of income or that allows the matter to go by default, that would not absolve the

co-accused who has been named in the offence on the charge of abetment under Section 109 of I.P.C. or reduce the burden of such co-accused in any manner. Viewed in this perspective, the submission of the Applicant of prejudice being caused to the Applicant because of absence of the co-accused who is the principal offender, is devoid of merits and, in law, cannot be the sole basis to quash the pending criminal prosecution.

6. Having considered the rival submissions, the first question that needs to be addressed is: whether the trial as against the principal accused (Accused No.1) has abated on account of his death. In the first place, there is no express provision in the Code of Criminal Procedure governing situation under consideration, unlike Section 394 of the Code, which provides for abatement of appeals. However, that provision cannot be invoked in relation to the pending trials or the criminal prosecution before the subordinate Courts as such. Counsel for the Applicant would, however, rely on paragraph 84 of the Criminal Manual issued by the High Court Appellate Side, Bombay, by which the subordinate Courts are also bound. The same reads thus:-

> "Where, pending a criminal case, the accused is reported to be dead and the case, therefore, abates, the Court should pass an order recording these facts in the following form:
>
> "Accused reported to be dead."
>
> "Proceeding abate."
>
> and send the papers to the Record room."

Relying on this provision, it is contended that the trial as

against the deceased accused No.1 will have to be treated as abated. Indeed, this provisions is part of Criminal Manual issued by the High Court of Bombay, which in turn has been formulated in exercise of power conferred under Article 227(2)(b) read with Article 227(3) of the Constitution of India. Clause (1) of Article 227 empowers every High Court to have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. Clause (2) of Article 227 stipulates that without prejudice to the generality of the foregoing provision, the High Court may, amongst others, make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts. The Criminal Manual of Bombay High Court has been issued after previous approval of the Governor as is required by the proviso to Clause (3) of Article 227. As mentioned earlier, there is no express legislative provision dealing with the situation on hand, as to how criminal trial should be governed in case of death of one or more accused involved in the trial. In that sense, the provision in the form of para.84 of the Criminal Manual cannot be said to be inconsistent, but one which attempts to supplement the provisions of the Criminal Procedure Code. Thus understood, the subordinate Courts will be bound by the said procedure laid down in para.84 of the Criminal Manual. There is another provision to which reference can be usefully made. Section 477 of the Criminal Procedure Code provides for power of the High Court to make Rules. Clauses (d) of sub-section (1) of Section 477 of the Code empowers the High Court, with the previous approval of the State Government, to make Rules on any other matter which is required to be, or may

be, prescribed. In other words the Applicant may be right to the limited extent that the trial as against the principal accused (accused No.1) has abated after his death.

7. The next question as is required to be addressed is, what is the consequence or effect of such abatement of the trial. There is no provision either in the Code or any other law brought to my notice, which provides for consequences of abatement of criminal proceedings. Expression "abatement" is not defined in the Act or the Code. That leaves us to rely on the dictionary meaning of expression "abate". The Judicial Dictionary, 12th Edition of K.J. Aiyar's has spelt out the meaning of expression "abate" as follows:-

> "Abate: is a generic term derived from French word "Abatre" and signifies to quash, to beat down or destroy. "Abate" means to throw down, to beat down, destroy or quash (Black's Law Dictionary, Fifth Ed.). To diminish or take away, to prostrate, to beat down remove or destroy; also to let down or cheapen the price in buying or selling. [Encyc. L., Stroud, p.5].
>
> To prostrate, break down, remove, or destroy; also to let down or cheapen the price in buying or selling. [Wharton's Law Lexicon, 1976 Reprint Ed.].

Expression "abatement" has been separately spelt out, in the same dictionary. "Abatement of criminal proceedings" has been termed to mean their termination without a decision on the merits and without the assent of the prosecutor. If this is the legal position or meaning of abatement, it is incomprehensible as to how the abatement of criminal proceedings as against Accused No.1 should result in terminating the entire action, even against the surviving co-accused independently charged for abetment under Section

109 of I.P.C. Indubitably, the abatement of criminal proceedings as against one of the accused even if principal accused, by itself cannot be the basis to terminate the entire criminal action, assuming that the remaining accused (co-accused) are charged only for abetment under Section 109 of I.P.C.

8. To get over this position, Counsel for the Applicant relied on the decision of the Apex Court in the case of **Central Bureau of Investigation v. V.C.Shukla & Ors., AIR 1998 SC 1406**. In my opinion, this decision is of no avail to the Applicant herein. In that case, the gravamen of the charge against the co-accused Jains was that they had entered into two separate agreements one with Shri Shukla and the other with Shri Advani, in terms of which they were to make certain payments to them as a gratification other than legal remuneration as a motive or reward for getting their favour while they were 'public servants and in pursuance of the said agreements payments were actually made to them. The Court on analysing the material on record positively found that the prosecution was not able to make out prima facie case to prove that shri Advani and Shri Shukla were parties to such conspiracy. On this finding, the Court proceeded to hold that, the theory of conspiracy as framed/sought to be framed cannot stand also against the Jains for the simple reason that in a conspiracy there must be atleast two parties. In other words, the exposition in the said decision is on the fact situation of that case. In paragraphs 49 to 51 of the same judgment, the Apex Court has analysed the relevant provisions including Section 107 of the I.P.C. and noted that, as the

case before it fell within the third clause and not the first and second clause, the co-accused who is charged of abetment under Section 109 ought to succeed along with the principal offender. The legal position as to the purport of charge of abetment has been considered by the Apex Court in **Jamuna Singh v. State of Bihar, reported in AIR 1967 SC 553.** On analysing the relevant provisions such as Sections 107 to 109 of I.P.C. and the decisions on the point, it is observed by the Apex Court that it cannot be held in law that a person cannot ever be convicted of abetting a certain offence when the person alleged to have committed that offence in consequence of the abetment has been acquitted. It is further held that the question of the abettor's guilt would depend on the nature of the act abetted and the manner in which the abetment is made. It is only in the case of a person abetting an offence by intentionally aiding another to commit that offence that the charge of abetment against him would be expected to fail when the person alleged to have committed the offence is acquitted of that offence. The Apex Court has also noted that the offence of abetment is complete when the alleged abettor has instigated another or engaged with another in a conspiracy to commit the offence. It is not necessary for the offence of abetment that the act abetted must be committed. Reference can be usefully made to another decision of the Apex Court which has been pressed into service by learned A.P.P., in the case of **Gallu Sah v. State of Bihar, AIR 1958 SC 813.** Even in this decision in paras. 7 and 8, the Apex Court examined the purport of the offence of abetment. Referring to the Calcutta High Court decision in the case of **Umadasi Dasi v. Emperor, AIR 1924 Cal.1031**, the Apex Court noted that in the

majority of cases the general rule that where a person is charged with having committed an offence and another is charged with having abetted him in the commission thereof, and the prosecution fails to substantiate the commission of the principal offence there can be no conviction for abetment, might hold good; but there are exceptions to the general rule, particularly when there is evidence which satisfactorily establishes that the offence abetted is committed and is committed in consequence of the abetment.

9. Before the lower Court reliance was placed by the Applicant on the decision of the High Court reported in **(1999) Vol.101 (2) Bom. L.R.223 in the case of State of Maharashtra v. Ramdas S. Kurlekar & Ors.** In that case the charge against the principal accused was not proved, for which reason the co-accused who was charged only as an abettor was also granted benefit. That decision is again on the facts of that case as the role of the co-accused was stated to be only one of accompanying P.W.1 in the car to receive the amount.

10. In my opinion, the decisions pressed into service by the Counsel for the Applicant, are inapposite. In the first place, the question of granting benefit to the co-accused charged with abetment, relying on the circumstance of abatement of the criminal proceedings (trial) as against the principal accused, cannot be countenanced. This is so because, such benefit can be granted only when the principal accused was to be acquitted of the principal offence for which he has been charged. In the case of abatement of criminal proceedings, however, it is not termination of proceedings

with a decision on merit with the assent of the Public Prosecutor. In other words, abatment of criminal proceedings does not result in acquittal of the concerned accused. The scheme of Section 394 of the Code makes it amply clear that abatement of Appeal against the deceased accused does not entail in ab-initio dissolution of the criminal action. For, the legal representatives are given option to contest the appeal in so far as sentence of fine is concerned. Similarly, it is well settled that the remedy of revision can be pursued inspite of death of the accused. Thus understood, the principle invoked by the Applicant to claim benefit, relying on the abovesaid decisions is unavailable. A priori, the Applicant can succeed only if the prosecution were to fail in discharging the initial burden to establish the charge against the accused. Even if the prosecution failed to discharge the initial burden to establish the charge as against the principal offence, even then it will be imperative to demonstrate from the record that the prosecution case as against the applicant does not fall in the first or the second clause of Section 107 of I.P.C. and would only fall under the third clause thereof. No such argument was canvassed before the Lower Court or any serious attempt in that behalf has been made before this Court. The only document which is placed on record before this Court along with the impugned order, is the charge as framed against the accused by the Special Judge. That document cannot be the sole basis to consider the claim of the Applicant in this behalf. Be that as it may, all those questions will have to be addressed by the appropriate Court as and when occasion arises.

11. The learned Counsel for the Applicant would rely on the dictum of the Apex Court in the case of **Bondada Gajapathi Rao vs. State of Andhra Pradesh reported in AIR 1964 S.C. 1645.** In para.9 of the said decision it is observed that in so far as personal punishment (other than a fine) is concerned that stands dissolved by the death of the offender and an appeal to get that punishment set aside becomes infructuous and abates. This decision is of no avail to the Applicant. In that case the Court was called upon to consider whether the revision petitions and some appeals from sentences of fine might be continued by the legal representatives on the death of the accused pending such proceeding. In other words, the abovesaid exposition in the said decision is in the context of the issue considered in that judgment. This position is amply clear from the observation in the same paragraph 9 of the decision a little earlier where it is stated as:-

> "....It is not my purpose to consider, whether in the absence of any direct injury to the living every criminal proceeding must come to an end after the death of the accused whether before his conviction or after...."

Be that as it may, that decision is not an authority on the point in issue under consideration.

12. That takes me to the last submission canvassed on behalf of the Applicant. According to the Applicant, even if the Applicant is required to face the trial, the trial would be unjust and the Applicant will suffer grave prejudice due to

the absence of the co-accused (accused No.1) who was primarily required to satisfactorily account of pecuniary resources or property disproportionate to his known sources of income, being a public servant. Indeed, Section 13(1)(e) is an offence which is committed by a public servant. A public servant is said to have committed the offence of criminal misconduct, if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income. That, however, does not mean that persons other than the public servant cannot be tried for the offence under the Act along with the principal offender, who is a public servant. The Apex Court in the case of **P.Mallammal vs. State, reported in AIR 1999 SC 2556 and in State of U.P. v. Udai Narayan reported in 1999 (8) SCC 741** has held that a person who is not a public servant can be prosecuted under the provisions of the Act. In so far as the rule of evidence to establish offence under Section 13(1)(e), the same is no more res integra. Burden is very limited on the prosecution. It is sufficient for the prosecution to show that the accused is a public servant; the nature, and the extent of the pecuniary resources or property which were found in his possession or any person on his behalf, what were his known sources of income (known to the prosecution); that such resources or property found in possession were disproportionate to his known sources of income. The burden then shifts on the public servant to satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income. If

the public servant fails to do so, the legal presumption against such Government servant would operate, resulting in recording a finding of guilt and conviction. A priori, merely because the principal accused is not available for trial, that would not enure to the benefit of the co-accused named as abettor under Section 109 of the I.P.C. The test to consider this argument, as is rightly contended by the learned P.P., is, in a given case where the principal accused is available for trial and allows the matter to go by default or for that matter fails to satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income, the co-accused named with charge of abetment under Section 109 will be bound by such finding against the principal accused. Thus understood, the presence or absence of the principal accused for the trial cannot be the basis to proceed or not to proceed against the co-accused charged of abetment under Section 109 of I.P.C. Such co-accused will have to stand the trial on his own. If he so desires, it is open to him to produce evidence to satisfactorily account of pecuniary resources or property disproportionate to the known sources of the principal accused. In the present case, the co-accused is none other than the wife of the principal accused. The prosecution claims that the real owner of the resources or property in the name of the Applicant was the Accused No.1 who was the public servant. Even otherwise, the trial ought to proceed against the Applicant herein in accordance with law and as rightly observed by the Special Judge after recording of evidence and hearing the parties the final conclusion on the relevant aspects can be arrived at the stage of judgment.

13. Accordingly this Revision Application ought to fail.

The same is dismissed.

(A.M. KHANWILKAR, J.)